Wright Electric, Inc. *and* International Brotherhood of Electrical Workers, Local 292, AFL–CIO. Cases 18–CA–12820, 18–CA–13193, and 18–CA–13369

March 31, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On November 26, 1996, Administrative Law Judge William J. Pannier III issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings, and conclusions, to adopt the remedy as modified, and to adopt the recommended Order as modified and set forth in full below.[2]

The judge dismissed allegations that the Respondent violated Section 8(a)(1) and (4) by filing a civil lawsuit against the Union. Regarding this allegation, the General Counsel has excepted only to the judge's failure to find that the Board should retain jurisdiction pending final court resolution of the suit. We find merit in this exception.

The judge dismissed allegations that the Respondent violated Section 8(a)(1) by making discovery requests in connection with its lawsuit. The General Counsel has excepted to the judge's failure to find the discovery requests violated the Act. We find merit only in the exception pertaining to seeking discovery of employee authorization cards.

The judge found that the Respondent violated Section 8(a)(3) of the Act by refusing to hire Louis Lutz because of his union membership. The General Counsel has excepted to the judge's statement that the Respondent may litigate certain matters regarding Lutz' reinstatement in compliance. We find merit in this exception.

Background. The Respondent hired Thomas Ouellette in November 1992 and discharged him in February 1993 for allegedly "concealing and misrepresenting" certain facts about his employment history. Ouellette failed to state on his employment application that he had previously been employed by union contractors. The Union filed an unfair labor practice charge alleging that the Respondent violated Section 8(a)(3) by discharging Ouellette, and Ouellette filed a claim with the State of Minnesota for unemployment benefits. The unfair labor practice charge was dismissed, and the unemployment benefits claim was denied.

In August 1993, the Respondent filed a lawsuit in Minnesota District Court against Ouellette, the Union, and the Union's business agent, Michael Priem. The Respondent claimed that Ouellette, acting at the Union's behest, submitted a falsified employment application to the Respondent and thereby obtained a job and that Ouellette's actions were part of a "pattern and practice of fraud" perpetrated by the Union; and that the unfair labor practice charge and the unemployment benefits claim filed by Ouellette were "meritless and malicious." The Respondent's lawsuit also included claims for breach of contract and fiduciary duty of honesty and loyalty against Ouellette; recovery of Ouellette's salary and the benefits paid to him while he worked for the Respondent; unjust enrichment, fraudulent misrepresentation, and concealment; and wrongful use of property. The Respondent also made discovery requests, seeking information allegedly relevant to its lawsuit.

On January 14, 1994, the state court dismissed the malicious prosecution claims. The remaining claims are currently pending in state court. The General Counsel does not dispute the judge's finding that the Respondent has preserved its right to appeal the dismissal of the malicious prosecution claims and that therefore there has been no final judgment on these claims.

1. **Dismissal of unfair labor practice charges**. The unfair labor practice complaint in Case 18–CA–12820 alleges that the malicious prosecution allegations of the Respondent's lawsuit lacked a reasonable basis and were motivated by an intent to retaliate against employees for exercising their Section 7 rights. The complaint alleges that the Respondent violated Section 8(a)(1) and (4) by filing and maintaining its lawsuit.

The administrative law judge noted that in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 748 (1983), the Supreme Court stated that the Board "may not halt the prosecution of a state-court lawsuit, regardless of the plaintiff's motive, unless the suit lacks a reasonable basis in fact or law." The judge held that he could not conclude, based on the circumstances of this case, that the malicious prosecution claims lacked a reasonable basis in fact or law. The judge also noted that the holding in *Bill Johnson's* requires "a final adjudication" of the state court proceedings before the Board can "proceed to evaluation of the lawsuit and of the motivation for it." As stated above, the judge held that there has been no final adjudication of the malicious prosecution claims. The judge concluded that the allegations the

[1] The Respondent excepts to the judge's ruling, made at the hearing, granting the Charging Party's petition to revoke the subpoena served on it by the Respondent on April 16, 1996. For the reasons stated by the judge in his ruling, we find that he properly granted the Charging Party's petition to revoke the subpoena.

[2] In accord with *Excel Container, Inc.*, 325 NLRB No. 14 (Nov. 7, 1997), we shall change the date in par. 2(e) of the recommended Order from July 13, 1994, to August 24, 1993, the date of the first unfair labor practice.

Respondent violated the Act by filing its malicious prosecution claims must be dismissed.

The General Counsel does not dispute the judge's finding that the malicious prosecution claims do not lack a reasonable basis in fact and law. Nor does the General Counsel dispute the judge's conclusions, except that he urges that the case should be held in abeyance pending disposition of the state court litigation rather than dismissed. We agree.

In *Bill Johnson's*, the Supreme Court held that when called upon to determine whether a lawsuit that raises genuine issues of material fact is unlawful at a time when the suit is still pending, "the Board must await the results of the state-court adjudication with respect to the merits of the state suit," id. at 749 (emphasis added), and that the Board "should stay [the 8(a)(1) and (4)] proceedings until the state-court suit has been concluded." Id. at 746 (emphasis added).

Accordingly, no exceptions having been filed to the judge's finding that the malicious prosecution claims are still pending, we shall sever and remand to the judge, rather than dismiss, that part of the unfair labor practice proceedings in Case 18–CA–12820 which alleges that the Respondent filed a "baseless and retaliatory" lawsuit. The judge is directed to hold that allegation in abeyance until he receives notification that the state court has resolved the matter pending before it. At that point, the judge can determine, based on the state court's action, whether the state court suit lacked merit and, if so, whether it was filed for a retaliatory motive.

2. **Discovery issues**. The unfair labor practice complaint alleges that the Respondent's discovery requests, made in connection with its lawsuit, seek information which is protected by the Act and which is not relevant to the state court lawsuit. The judge found it unlikely that the Supreme Court in *Bill Johnson's* would direct the Board to allow a state court lawsuit to proceed while permitting the Board to enjoin discovery of items sought during the state court proceeding.

The General Counsel has excepted to the judge's finding that the Respondent's discovery requests may go forward. We agree with the General Counsel only as to the Respondent's request for employee authorization cards. For the reasons stated below, we find that the Respondent violated Section 8(a)(1) by seeking to obtain the identities of employees who signed authorization cards.

It is axiomatic that "an employer who seeks to obtain the identities of employees who sign authorization cards . . . violates the Act." *National Telephone Directory Corp*., 319 NLRB 420, 421 (1995). The Board zealously seeks to protect the confidentiality interests of employees because of the possibility of intimidation by employers who obtain the identity of employees engaged in organizing. As discussed in *National Telephone*, the courts have similarly recognized that "it is entirely possible that employees would be 'chilled' when asked to sign a union card if they knew the employer could see who signed." 319 NLRB at 421 (quoting *Committee on Masonic Homes v. NLRB*), 556 F.2d 214, 221 (3d Cir. 1977). Given that the Respondent's conduct would reasonably tend to deter the exercise of protected activity, we now turn to an examination of the Respondent's business justification.

The Respondent claims that the Union, through Ouellette, gained access to its premises to engage in an unlawful purpose, i.e., to disrupt its business. According to the Respondent, the Union's response that Ouellette obtained employment to organize the Respondent's employees makes any authorization cards from the Respondent's employees discoverable under the theory that the existence of such cards would tend to support the Union's contention, while the absence of such cards would support the Respondent's claim that the Union's object was to engage in an unlawful purpose.

We do not accept the Respondent's assertion that the absence of cards from its employees would prove that the Union's objective was unlawful. But, even assuming it were true, we find that the Respondent has failed to state an interest in examining employee authorization cards that outweighs the considerable confidentiality interests of employees who sign cards. The Respondent itself has demonstrated the weakness of its claimed business justification by suggesting there are less intrusive ways of obtaining the information it seeks. For example, the judge in the civil suit could, in an in camera inspection, examine authorization cards submitted by the Union to determine whether any cards were signed by Respondent's employees. Such an accommodation, suggested by the Respondent, would not prejudice the Respondent's case.

Further, we do not agree with the judge that *Bill Johnson's* requires the Board to allow the request for authorization cards to go forward. The Supreme Court, at footnote 5, held that the Board has the authority to enjoin a lawsuit "that has an objective that is illegal under federal law." In that situation, "the legality of the lawsuit enjoys no special protection under *Bill Johnson's*." *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 834 (1991), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993). The Respondent's seeking of the names of employees who signed authorization cards has an objective that is, as pointed out above, illegal under Federal labor law. Accordingly, the Respondent's discovery request falls within the "illegal objective" exception to *Bill Johnson's* and enjoys no special protection. We therefore find that the Respondent violated Section 8(a)(1) by seeking discovery of employee authorization cards.

3. **Refusal to employ Lutz**. The judge found that the Respondent violated Section 8(a)(3) by refusing to hire

Louis Lutz and recommended that the Respondent be ordered to offer him employment.[3] In his decision, however, the judge stated that the Respondent could litigate in compliance the theory that Lutz is not entitled to employment because his was one of a number of applications submitted by an untrustworthy source, i.e., the Union.[4] We find merit in the General Counsel's exception to the judge's statement about what can be litigated in compliance.

Although the Respondent had already filed its lawsuit against the Union for submitting purportedly falsified applications, Manager of Human Resources Earl Standafer never relied on that as a reason for rejecting Lutz. Further, the Respondent's counsel admitted that the alleged untrustworthiness of the Union was not "the basis for what happened with respect to Mr. Lutz." Given the Respondent's admission of this fact, we can discern no policy reasons why the Respondent should be allowed to litigate in compliance whether another entity's alleged misconduct entitles the Respondent to avoid its obligation to remedy its discrimination against Lutz. In short, we hold that the Respondent may not raise in compliance the Union's alleged untrustworthiness as a referral source to foreclose its obligation to offer Lutz employment.

ORDER

The National Labor Relations Board orders that the Respondent, Wright Electric, Inc., Plymouth, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Seeking to obtain the identities of employees who signed authorization cards.

(b) Refusing to hire or otherwise discriminating against Louis John Lutz, or any other employee, because of sympathy toward, or activity on behalf of, International Brotherhood of Electrical Workers, Local 292, AFL–CIO, or any other labor organization.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Louis John Lutz immediate employment to the position for which he applied or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges, dismissing, if necessary, any employees hired to fill the position.

(b) Make Louis John Lutz whole for any loss of earnings and benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire Lutz, and within 3 days thereafter, notify Lutz in writing that this has been done and that the refusal to hire will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Plymouth, Minnesota facility, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 24, 1993.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint allegations in Case 18–CA–12820 that the Respondent violated Section 8(a)(1) and (4) of the Act by initiating and maintaining a civil suit in the District Court, Fourth Judicial District, County of Hennepin, State of Minnesota, against the Union, Union Business Agent Michael J. Priem, and employee Thomas J. Ouellette, alleging malicious prosecution by the defendants by the filing of an unfair labor practice charge with the Board in Case 18-CA-12542 and by filing an unemployment insurance

[3] We shall modify the judge's recommended Order and notice to make clear that this is a refusal to hire case. See *B E & K Construction Co*., 321 NLRB 561 (1996); *Casey Electric*, 313 NLRB 774 (1994).

[4] The Respondent argues that the Union engaged in misconduct by submitting false employment applications; this misconduct makes the Union an untrustworthy source of applicants; the Respondent therefore should be allowed to reject all applicants from the Union; and thus Lutz, an applicant referred by the Union, should not be entitled to employment.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

claim with the Minnesota Department of Jobs and Training are severed from this proceeding and remanded to the administrative law judge. The judge is directed to hold those allegations in abeyance until he receives notification that the state court has resolved the matter pending before it. At that point, the judge can determine, based on the state court's action, whether the state court suit lacked merit and, if so, whether it was filed for a retaliatory motive.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT seek to obtain the identities of employees who signed authorization cards.

WE WILL NOT refuse to hire, or otherwise discriminate against Louis John Lutz, or any other employee, for supporting International Brotherhood of Electrical Workers, Local 292, AFL–CIO, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Louis John Lutz immediate employment to the position for which he applied or, if such position no longer exists, to a substantially equivalent position, dismissing, if necessary, any employee hired to fill the position, without prejudice to his seniority or any other rights or privileges which he would have enjoyed had we not unlawfully refused to hire him.

WE WILL make Louis John Lutz whole for any loss of earnings and benefits resulting from our discriminatory refusal to hire him, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire Louis John Lutz, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the refusal to hire him will not be used against him in any way.

WRIGHT ELECTRIC, INC.

Pamela W. Scott, Esq., for the General Counsel.
Gregg J. Cavanagh, Esq. (Leonard, Street & Deinard), of Minneapolis, Minnesota, for the Respondent.
Connie L. Howard, Esq. (Garber & Metcalf), of Minneapolis, Minnesota, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Minneapolis, Minnesota, on April 23, 1996, and the record was closed by Order of June 17, 1966. On April 11, 1994, an amended complaint and notice of hearing was issued by the Regional Director for Region 18 of the National Labor Relations Board (the Board), in Case 18–CA–12820. It alleged violations of Section 8(a)(1) and (4) of the National Labor Relations Act (the Act), and was based on an unfair labor practice charge filed on September 13, 1993, and amended on February 18, 1994. An amendment to complaint issued on August 5, 1994, deleting two paragraphs of the amended complaint.

On October 27, 1994, the Regional Director issued a complaint and notice of hearing in Case 18–CA–13193, based on an unfair labor practice charge filed on July 13, 1994, alleging violations of Section 8(a)(1) and (3) of the Act. By order consolidating cases issued on October 27, 1994, the Regional Director consolidated Cases 18–CA–12820 and 18–CA–13193.

On November 9, 1994, the Regional Director issued a complaint and notice of hearing in Case 18–CA–13369, based on an unfair labor practice charge filed on November 9, 1994, alleging violations of Section 8(a)(1) of the Act. On February 27, 1996, the Regional Director issued an order further consolidating cases which consolidated Case 18–CA–13369 with the already consolidated Cases 18–CA–12820 and 18–CA–13193.

All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based on the entire record, on the briefs which were filed, and on the demeanor of the witnesses, I reach the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

There are essentially two aspects to this consolidated proceeding. The first arises from the employment of Thomas A. Ouellette by Wright Electric, Inc. (the Respondent).[1]

[1] At all material times, Respondent has been a Minnesota corporation, with an office and place of business in Plymouth, Minnesota, engaged as an electrical contractor for residential and commercial projects. It admits that, at all material times, it has been engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act, based upon a stipulation that it annually provides services valued in excess of $50,000 to enterprises located in Minnesota, each of which, in turn, either annually purchase and receive products valued in excess of

Ouellette began working for Respondent on November 12, 1992, as an electrician. He was discharged on February 5, 1993, because Respondent discovered that, with regard to his prior employment experience, Ouellette had misstated certain facts, and had not revealed certain other facts, on his application for employment. Ouellette did so, despite the fact that he signed the "Agreement" portion of the application which stated, inter alia, that he certified his answers "as true and complete" and that he "understand[s] that false or misleading information given in my application or interview(s) may result in discharge."

Essentially, the application's misstatements and nondisclosures pertained to prior employment which might have revealed to Respondent that Ouellette had worked for contractors with collective-bargaining relationships with International Brotherhood of Electrical Workers, Local 292, AFL–CIO (the Union).[2] Its business agent organizer, Michael J. Priem, testified that he had told Ouellette, before the latter had applied for employment with Respondent,

> that if he believes that putting down a union contractor on that application would stop him from being hired, that maybe he should leave that union—that union contractor off the application, if he believes—if he firmly believes he's going to be discriminated against or not hired, because he puts down a union firm on an application, leave it off.

Priem testified, however, that he "didn't know what [Ouellette] had—what he had put on the application until later on."

As pointed out above, Ouellette was hired by Respondent. He worked for it until he was discharged on February 5, 1993. As to that event, Priem testified that he had received a telephone call from Ouellette who reported that he had been transferred to a job where there were supervisors who knew that Ouellette had worked previously for a union contractor and who had reported that fact to one of Respondent's supervisors. In consequence, Priem prepared a letter to Respondent, stating that Ouellette was a union member and would "be engaging in protected concerted activity."

The letter was faxed during the morning, testified Priem, and hand-delivered to Respondent. "I think I delivered it around, approximately 1:00 in the afternoon and Tom was beeped at about 1:30 that same day," Priem testified. According to him, Ouellette responded to the beep, was told to report to the shop, did so, and was told to turn in his truck and go home, as there was a lack of work. Ouellette "was called back to work about three days later," Priem testified, "and worked either part of the day or three-fourths of a day, whole day or whatever and was terminated." The Union filed a charge—Case 18–CA–12542—but it eventually was dismissed by the Regional Director. That dismissal was sustained on appeal to the General Counsel. Ouellette also filed for unemployment insurance benefits, with the Minnesota Department of Jobs and Training, but his claim, likewise, was denied.

The foregoing facts supply background for the issues raised in the first aspect of the instant consolidated proceeding. As described in greater detail in subsection B below, on August 24, 1993, Respondent filed a complaint against Ouellette, the Union, and Priem in the District Court, Fourth Judicial District, of the State of Minnesota. Two of that complaint's 11 claims pertained to the charge in Case 18–CA–12542 and to Ouellette's claim of unemployment benefits, alleging in each instance malicious prosecution. A motion to dismiss the complaint was granted as to the malicious prosecution claims, but was denied as to the other nine claims.

On the basis of that dismissal, the General Counsel alleges that, with respect to each claim, Respondent had been "motivated by an intent to retaliate against employees for exercising their rights under the Act." As a result, alleges the General Counsel, Respondent interfered with, restrained, and coerced employees in the exercise of rights protected by the Act, in violation of Section 8(a)(1) of the Act, and, also, discriminated against employees for filing charges or giving testimony under the Act, in violation of Section 8(a)(4) and (1) of the Act.

On August 24, 1993, Respondent also filed, in conjunction with its complaint, a first request for production of documents and, as well, a first set of interrogatories. On October 20, 1993, it filed a second request for production of documents. All were directed to the Union, only. However, in the amended complaint and amendment to complaint in Case 18–CA–12820, the General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by requesting documents and responses to interrogatories concerning: efforts to organize or "salt" Respondent or other nonunion employees; any communications with Respondent's employees; any authorization cards received from Respondent's employees; any charges or complaints filed or lodged against Respondent by the Union; information relating to Michael Johnson, Clifford Maki, or James LeVoir, or other alleged "salts"; and, newsletters or informational bulletins given to members since January 1, 1991, except insofar as they relate to the Union's urging or otherwise advising members to misrepresent matters of fact to employers. Requests for such information violate Section 8(a)(1) of the Act, contends the General Counsel, because the information is irrelevant to the remaining state claims made by Respondent and, further, is privileged from disclosure to an employer under the Act.

A final element to the first aspect of this consolidated proceeding occurred over a year later. On November 4, 1994, Respondent issued notices of taking deposition to Louis John Lutz, Clifford Maki, and Michael Johnson. On the immediately preceding day, November 3, it issued notices of taking depositions to certain educational institutions and employers, seeking information concerning those three individuals. For example, from the educational institutions, Respondent sought such information as attendance dates, course records, and transcripts, diplomas, and certificates for Lutz, Maki, and Johnson. From the employers, Respondent sought such information as those three individuals' resumes, interview records, employment history, compliance with employment policies and procedures, employment separation, and eligibility for rehire.

The General Counsel alleges that all these notices of taking deposition violate Section 8(a)(1) of the Act. They are unrelated to the claims against Ouellette, the Union, and Priem, contends the General Counsel. Furthermore, it is argued, dis-

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$50,000 directly from points outside of the State of Minnesota or, alternatively, sells and ships products valued in excess of $50,000 directly to points outside of Minnesota.

[2] At all material times, the Union has been a labor organization within the meaning of Sec. 2(5) of the Act.

covery of such information tends to interfere with Lutz, Maki, and Johnson's exercise of Section 7 rights.

The second aspect of this consolidated proceeding arises from events which occurred during the late winter and spring of 1994. Respondent's human resources manager, Earl Standafer, testified that one of his "main guys" who performed remodeling work—Bob Higgs—had said that his home was up for sale and, once sold, that he intended to quit and move to Montana. Obviously, there was no timetable for Higgs' departure, given the fact that it was contingent upon sale of his home. Still, Standafer sought a smooth transition from Higgs to a replacement electrician.

To effect it, Standafer placed the following help wanted advertisement in the Minneapolis Star Tribune during mid-March:

> ELECTRICAL JOURNEYMAN We are taking applications for an individual that would like to grow with a well-established electrical contractor. Applicant must have residential and remodel exp. Most projects are of a larger nature with established general contractors. Wages depend on experience. Please send resumes to: Box M5579 Star Tribune, 425 Portland, Mpls. MN 55488–0700

Priem testified that he saw it and assumed that the advertisement had been placed by a nonunion contractor.

Lutz then was unemployed. After discussion of the ad with Priem, Lutz prepared a resume. It showed that he possessed Minnesota licenses as both a Class A Journeyman and a Class A Master. It is undisputed that the latter is the highest ranking license that an electrician can obtain in Minnesota. It allows the holder to become self-employed and, also, to work for someone who needs, but does not possess, a Master's license.

As to work experience, Lutz recited on his resume:

> *Williams Electric*—Commercial, Residential & Remodel.
>
> *Commonwealth Electric*—All phases of electrical construction on Methodist Hospital, University of Minnesota hospital, Riverside Power Plant, AMFAC Hotel, Nicollet Mall and IDS Tower.
>
> *Industrial Electric*—All phases of electrical construction on Mount Sinai Hospital, Lock & Dam No 1, Cargill Elevator.
>
> *Parsons Electric*—All phases of electrical construction on Norwest Bank Building, Edinburgh Park, Group Health, west Bank, Mpls, Nordstroms and Camp Snoopy, Mega Mall, Plaza Hotel, Oppenheimer Wolf and Donnelly Offices.
>
> *Sterling Electric*—All phases of electrical construction—NSP Main Office, Minneapolis, St. Marks Cathedral—Mpls.

Lutz gave the completed resume to Priem.

Priem prepared a covering letter to "Mr. Merit Shop Contractor." Its text states, in pertinent part, that Lutz had been a union member for over 15 years, was certified as a journeyman by the joint Apprenticeship and Training Committee, was willing to work on the same terms and conditions as other qualified employees, and "that any protected activity in which Mr. Lutz may choose to engage following his employment by you will be conducted strictly within the guidelines established by law and the National Labor Relations Board and will not interfere with his efficiency or productivity." Priem sent his letter and Lutz' resume to the location listed in the help wanted advertisement.

Respondent acknowledges having received them, along with the resumes of six other individuals. None of those seven applicants was offered employment. Instead, Respondent hired Peter J. Abrahamson, an electrician who had not even responded to the Star Tribune advertisement. Furthermore, Standafer acknowledged that while he had made an effort to contact two of the seven March 1994 applicants—Dean A. Bartyzal and James Donald Marston—he had made no effort whatsoever to contact Lutz.

Abrahamson began working for Respondent on Monday, May 19, 1994. Standafer testified that Higgs had not quit until, "I believe June or July." The General Counsel alleges that Respondent's refusal to employ, or even to consider for employment, Lutz had been unlawfully motivated by his sponsorship by the Union and, accordingly, violated Section 8(a)(3) and (1) of the Act.

B. The Complaint Filed in Minnesota District Court

Respondent's president, Terrance Korthof, testified that "I made that decision" to file the state complaint against Ouellette, the Union, and Priem on August 24, 1993. He denied that he had done so as a means of retaliating against them, because Priem was a union official, because Ouellette was a union member, or because of involvement in lawful union activities. Instead, Korthof testified, his sole reason for having decided to file the suit had occurred

> when the unemployment charges were brought against us, I sat through the whole hearing listening to what was going on and what took place there and ultimately it ended up that it was fraudulent and we weren't anywhere at fault with what we had done to Mr. Ouellette and subsequent to that time then there was also some NLRB charges that were filed against us through Mr. Priem on Mr. Ouellette's behalf that also ended up with no merit and the charges came, all during this process the cost of the company was extensive, the time lost and this continually going on and on with—running up costs, had to begin to put a stop to the actions that were taking place.

Neither the General Counsel nor the Union challenged Korthof's testimony about the costs incurred by Respondent in connection with those proceedings.

Nor did they challenge Korthof's testimony that, during the unemployment hearing on March 29 and April 22, 1993, Priem had admitted that, with regard to Michael Johnson, "Priem had advised him of something that was false," and, further, "there was another individual by the name of Maki that had [a] similar type application and then there were five others that Mr. Priem was involved with that came in[.]" Indeed, as set forth in subsection A above, Priem testified that he had suggested to Ouellette that the latter could omit the names of union contractors from his application with Respondent, if Ouellette felt that their inclusion would lead to a discriminatory refusal to be hired.

On the day after Respondent filed its state complaint, Administrative Law Judge Gerald A. Wacknov's decision issued in Case 18–CA–12598. In it, Judge Wacknov dismissed a complaint alleging that Respondent had refused to hire em-

ployees because of their activity as union informants and activists.[3]

The state complaint filed by Respondent alleged certain facts and, as noted in subsection A above, enumerated 11 claims on the basis of those alleged facts. As to those alleged facts, Respondent's complaint alleges generally that Ouellette, the Union, and Priem "in concert and in furtherance of a common purpose, engaged in all of the activities constituting the claims for relief alleged" in it.

Those factual activities, to the extent pertinent to the instant proceeding, are alleged in Respondent's complaint to be that Ouellette had been employed to provide services under an employment contract with Respondent; that he obtained that employment by making representations some of which constituted misrepresentations and, in other respects, concealed certain facts about his employment history; that he had been hired when Respondent would not have done so had it been aware of those misrepresentations and concealments; and, that he had been terminated once Respondent learned about them. As to the Union and Priem, paragraph 11 of Respondent's complaint alleges as fact:

> Ouellette sought employment with [Respondent], and engaged in the misrepresentations and concealments described above, at the request of [the Union] and Priem, and in furtherance of their unlawful objectives. [The Union] and Priem enlisted Ouellette to engage in such misrepresentations and concealments as part of a pattern and practice of misrepresentation and concealment.

Based on those factual allegations, the complaint claims against only Ouellette breach of at-will employment contract, breach of fiduciary duty and duty of loyalty, relief for recovery of salary and benefits, and relief for unjust enrichment. On the basis of each claim, Respondent contends that it incurred as damages "costs including, but not limited to, the costs of hiring, orienting, and training Ouellette, the costs of Ouellette's salary and benefits, the costs of investigating Ouellette's unlawful activities, and the costs incurred in replacing Ouellette when he was terminated from his employment, in an amount to be proven at trial." Under its claim for recovery of salary and benefits, Respondent further seeks restoration of amounts which it "furnished" to Ouellette.

The claims against Ouellette, the Union, and Priem, based on the above-described factual allegations, are relief for fraudulent misrepresentation, for fraudulent concealment, and for wrongful use of property. Respondent claims that it incurred as damages the above-quoted costs and, as well, "is entitled to amounts including, but not limited to, the fair rental value of the use of [Respondent]'s physical facilities, vehicles, and equipment, and the fair value of equipment and supplies [Ouellette, the Union and Priem] used in connection with the above-described activities, in an amount to be proven at trial," for claimed fraudulent use of its property which Respondent had authorized Ouellette to use when it had employed him.

Those were not the only claims for relief enumerated in Respondent's complaint. Based on its alleged belief that Ouellette, the Union, and Priem "are continuing to submit employment applications containing false information to [Respondent] and others," Respondent includes a tenth claim, seeking "a declaration that [Ouellette, the Union and Priem's] conduct in submitting employment applications containing false information to [Respondent] and others is unlawful." Its final claim is for "an order permanently enjoining [Ouellette, the Union, and Priem] from submitting employment applications containing false information to [Respondent] or others." That claim is based on the specific allegation that Respondent

> will be irreparably harmed if [Ouellette, the Union and Priem] are not permanently enjoined from submitting employment applications containing false information to [Respondent] and others, in that [Ouellette, the Union and Priem] will continue to submit such applications to [Respondent] and others, and [Respondent] will be forced to make hiring and termination decisions with respect to persons submitting false applications, and will be subjected to continued malicious prosecutions by [Ouellette, the Union and Priem] when it makes those decisions.

In addition to its claims for declaratory and permanent injunctive relief, and for general and special damages described above, Respondent seeks interest, attorneys' fees and costs, and whatever other relief is deemed "just and proper." In a "[PROPOSED] FIRST AMENDED COMPLAINT," filed on September 23, 1994, Respondent adds a prayer for punitive damages, because Ouellette, the Union, and Priem allegedly "acted with deliberate disregard for the rights of [Respondent] and others" by breach of at-will employment contract; breach of fiduciary duty and duty of loyalty; the alleged facts giving rise to a right of recovery of salary and benefits and for unjust enrichment; fraudulent misrepresentation; false concealment; and, wrongful use of property. Significantly, no specific claim for punitive damages is made in connection with either of the malicious prosecution claims, though both are reasserted in Respondent's first amended complaint. By order dated October 20, 1994, the Honorable Harry Seymour Crump granted Respondent's "Motion to Amend their Complaint to add Punitive damages."

By the time that Respondent filed its proposed first amended complaint, both claims for malicious prosecution had been dismissed, by order and memorandum issued by the Honorable Stephen D. Swanson, judge of the district court, on January 14, 1994. That order was issued in response to Ouellette, the Union, and Priem's motion for judgment on the pleadings with prejudice, for failure to state a claim. That motion had been directed to the entirety of the claims enumerated in Respondent's complaint. As to the malicious prosecution claims, Judge Swanson pointed out that, "Minnesota courts have not specifically addressed the question whether a malicious prosecution claim may be based upon the initiation of administrative proceedings." He did not dispute the accuracy of Respondent's argument, and supporting citations, that courts in other jurisdictions—including the United States Courts of Appeals for the District of Columbia, Ninth and Tenth Circuits—have concluded that administrative proceedings, including specifically ones arising under the Act and under unemployment compensation statutes, may provide a basis for malicious prosecution claims.

Still, Judge Swanson concluded that the motion to dismiss the malicious prosecution claims should be granted, and those

[3] The fact that I did not receive Judge Wacknov's decision as an exhibit does not preclude me from taking administrative or official notice of it, FROE Rule 201, which I do.

claims dismissed, due to the "potential chilling effect on the determination of an employee's rights" which results from unemployment benefit claims and unfair labor practice charges. Thus, he stated, "Filing a claim with the commissioner of jobs and training is the only way for an employee who has been dismissed from his or her job to determine whether he or she may be eligible for unemployment benefits," and, moreover, "an unfair labor practice charge is necessary to give the NLRB a preliminary basis to determine whether there is justification to investigate the charging party's allegation and to set the statutory machinery in motion." (Citations omitted.)

Though well-reasoned, obviously Judge Swanson's conclusions are not beyond dispute and are not subject to disagreement, as the above-mentioned contrary conclusions in other jurisdictions show. Further, the General Counsel and the Union do not dispute Respondent's representation that "the two claims that have been dismissed under state law are still subject to appeal to the Court of Appeals and ultimately to the Minnesota Supreme Court," though not until there has been a final judgment on Respondent's complaint. In that respect, apparently Minnesota follows a final judgment rule similar to that which applies at the Federal level. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Apparently, it is that Minnesota rule which led Respondent to replead the malicious prosecution claims in its above-mentioned first amended complaint, filed almost 8 months after Judge Swanson's order and memorandum—so that it could preserve its record for appeal once a final judgment did issue on its complaint. Consequently, as to those two malicious prosecution claims, there has been no final judgment.

Beyond those two claims, Judge Swanson declined to dismiss Respondent's remaining nine claims. A description of his reasons is necessary to evaluate some of the General Counsel's allegations that Respondent violated Section 8(a)(1) of the Act, because of its discovery requests. With respect to claims made only against Ouellette, Judge Swanson pointed out that Minnesota courts have "imposed a duty of honesty and faithfulness" as an implied condition in employment contracts and "that dishonesty on the part of the employee may constitute a breach of the employment contract." As a result, though he viewed the claim for breach of fiduciary duty and duty of loyalty, as well as the claim for recovery of salary and benefits, as "subsumed in the breach of contract claim," Judge Swanson concluded that, "Sufficient issues of fact have been raised by the pleading as to [that] claim," and he declined to dismiss the first three claims against Ouellette. Moreover, he concluded that Respondent "has sufficiently set forth a claim for relief for fraud," which supports a claim for unjust enrichment, because "an unjust enrichment claim may be based on a claim for fraud[.]"

Similarly, Judge Swanson concluded that as the complaint pleads all elements of a fraud claim, and as Respondent alleges that Ouellette, the Union, and Priem "knowingly made a misrepresentation on which [Respondent] relied to [its] detriment," the motion to dismiss the fraudulent misrepresentation and fraudulent concealment claims should be denied: "Because it is possible for [Respondent] to submit additional evidence consistent with the fraud theory contained in the pleading. . . ." Moreover, because "it is possible to introduce facts consistent with the pleading to show that Ouellette used [Respondent]'s personalty for purposes beyond the scope of his employment," Judge Swanson denied the motion to dismiss the claim for wrongful use of Respondent's property.

With regard to the motion to dismiss Respondent's claim for declaratory relief, Judge Swanson stated that Minnesota courts possess "the power to grant a declaratory judgment in *any* situation where the judgment or decree will terminate the controversy or remove an uncertainty." (Citation omitted.) Having concluded that a controversy exists, he continued

> [Respondent] alleges that [the Union] has encouraged a number of applicants to misrepresent their work history in order to obtain employment at [Respondent]. Giving [Respondent] the benefit of the doubt, it is possible to present evidence to support this claim. If this claim can be proven, a declaratory judgment could terminate any remaining controversy; therefore, a motion for dismissal for failure to state a claim cannot be sustained.

As to Respondent's claim for injunctive relief, he stated that dismissal would be inappropriate, because such a claim "is a remedy, the applicability of which cannot be determined until a motion for relief is made or the underlying cause of action has been resolved." In sum, dismissal of Respondent's malicious prosecution claims did not foreclose claims for relief based upon the Union's alleged conduct in conjunction with employees whom it assertedly acted in concert.

Those other claims—or, at least, some of them—provide the basis for Respondent's defense to its discovery requests. Asked why Respondent had made those requests, Korthof denied that they had been motivated by any reason other than "to further get information so that we could pursue in [sic] our civil matter and to find out what was going on." He denied specifically that those requests had been made to retaliate against Ouellette, the Union, or Priem, and, moreover, because of anyone's union membership or activities.

It divulges no secret of the profession to point out that ordinarily it is counsel, not client, who determines the need for and extent of discovery which is undertaken. Both the General Counsel and Respondent point, in their briefs, to Minn.R.Civ. Rule 26.02(a) which accords parties discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action," and which continues, "It is not ground for objection that the information sought will be inadmissible at the trial if that information appears reasonably calculated to lead to the discovery of admissible evidence." In fact, that is an approach which is not significantly different, if any difference exists at all, from the one followed by the Board in evaluating petitions to revoke subpoenas issued during its formal proceedings.

In his brief on behalf of Respondent, counsel represents that his 1993 requests for production of documents is relevant to such state court factual allegations and issues as existence and extent of any agency relationship between Ouellette, on the one hand, and the Union and Priem, on the other; extent to which Ouellette's employment application misrepresentations and concealments were part of a pattern of fraud; extent to which Ouellette, the Union, and Priem were truly concerned with organizing Respondent's employees or, instead, were actually engaged in a predatory effort aimed at driving up Respondent's costs and putting it out of business, through such devices as specious unfair labor practice charges and baseless unemployment compensation claims; extent to which

fraudulent activity aimed at Respondent had been part of a broader scheme to defraud it and other employers, as well; and, extent to which other employees were being enlisted to file with Respondent and others employment applications which misrepresented some facts and concealed others. Similar purposes had motivated Respondent's late 1994 deposition requests, represented Respondent's counsel.

C. Refusal to Consider Employing Lutz

It is axiomatic that, in analyzing discrimination allegations, actual motive is the ultimate determination which must be made. See, e.g., *Concepts & Designs*, 318 NLRB 948, 950 (1995), and cases cited therein. Human Resources Manager Standafer testified that, on his own and without having consulted with anyone else, he had made the decision not to contact Lutz, after having received the latter's resume and Priem's covering letter stating that Lutz was applying for employment in response to the Star Tribune help wanted ad.

Called as a witness during the General Counsel's case-in-chief, Standafer was asked to explain why he had not contacted Lutz, upon having received his resume. He answered:

> I was looking for a residential—someone with some residential and remodelexperience and although Mr. Lutz has a—quite a history of jobs, the only residential history that he had listed was with Williams Electric which had been out of business for some time at the time of the application. And the remainder of his work had all been either industrial or commercial.

Before being excused as a witness at that point, Standafer repeated that explanation:

> Because his work history at the—the only residential that he had listed was for Williams Electric which had been out of business for a few years at least at the time of the application and substantial work that he performed while impressive was all in commercial and industrial and I was looking for a residential electrician at the time.

In the course of advancing those explanations, Standafer denied that there had been any reason for not contacting Lutz, other than the latter's lack of recent residential and remodel experience. However, Standafer effectively contradicted that denial when he appeared as a witness during Respondent's case-in-chief. At that point, he added another reason for not having contacted Lutz:

> Other than those already stated, was [sic] there was one other thing and that was with his last stated rate of pay, even though it said that he would be willing to work for whatever wages were offered, it has been my experience in this field that when you offer someone that much less to do a job, generally they only use it long enough until they can find another job that pays what they were making and would—and at that time would generally take that job and leave you without an employee, so you have to start this whole process over again.

Not only was Standafer's testimony internally contradictory when he appeared as Respondent's witness, when compared with his denial when he earlier appeared as a witness during the General Counsel's case-in-chief. There were other aspects of his testimony which tended to contradict his own above-quoted explanation for having disregarded the application for Lutz. As pointed out in subsection A above, a total of seven resumes were received in response to the Star Tribune advertisement. It is undisputed that the one of Dean A. Bartyzal did show residential experience. But, when he contacted Bartyzal, Standafer discovered that Bartyzal sought only part-time employment.

Standafer also made effort—unsuccessfully, as it turned out—to contact James Donald Marston. Yet, in his resume, under "Work Experience," Marston had recited:

> West Star Electric
> 6336 Lake Land Avenue North
> Brooklyn Park, Minnesota
> (612) 537–0807
> Duties: Residential, Commercial, Remodel Wiring
> Position: Apprentice
> June 19, 1989—September 30, 1989
>
> Mueller and Pribyl Utilities
> Highway 55
> Hamel, Minnesota
> Position: Laborer
> May, 1988—September, 1988
>
> Devac, Incorporated
> Plymouth, Minnesota 55411
> Position: Shipping and Receiving
> June, 1986—November, 1986
>
> School District #877
> Buffalo, Minnesota 55313
> Position: 7th Grade Baseball Coach
> Spring of 1983
>
> Dickson Construction
> Buffalo, Minnesota 55313
> Position: Carpenter
> Summers of 1981 and 1982

Obviously, that recitation does not show that Marston had performed residential or remodel work—or any other electrician's work, for that matter—for over 4 years before having submitted his resume to Respondent.

Furthermore, the lone electrician's job which Marston recited having performed was work which he had performed as an apprentice, not as a journeyman. Next to those resume entries, Marston had handwritten that he received his Class A Journeyman's License on March 2, 1994—but a few days before having submitted his resume to Respondent. That hardly shows significant experience having actually worked as a journeyman electrician. Nevertheless, Standafer conceded that he had attempted to contact Marston about employment with Respondent.

In an effort to explain his contrasting disregard of Lutz' resume, Standafer testified:

> [T]he fact that [Marston's] most recent work history that he has on here was with West Star Electric who does probably 50/50 residential commercial, maybe a little heavier in the residential and it was dated in '89 which was about a five year gap there I guess from 89 to 94 and then right beside it he had "received my Class A journeyman's license March 2 of '94" and I was just wondering if he had been with West Star that entire time or where he had been for that matter.

That explanation, however, gives rise to two other inconsistencies in Standafer's testimony.

First, if "from 89 to 94" Marston "had been with West Star that entire time," that would mean that he had misrepresented on his resume his employment history with that firm. For, the resume states explicitly, "June 19, 1989—September 30, 1989." And, as set forth in subsection B above, misrepresentation of employment history had been one of the claims that Respondent included in its state complaint against Ouellette, the Union, and Priem. Standafer never explained why he would have gone to the trouble to try contacting an applicant who, seemingly, might have misrepresented his employment history, at the very time that Respondent was suing a former employee for having done the same thing.

Conversely, if Marston "had been for that matter" working for someone other than West Star "from 89 to 94," that would mean that he failed to disclose—in effect, concealed—his most recent "Work Experience." Again, concealment was the basis for another of Respondent's claims in its state complaint against Ouellette, the Union, and Priem. In light of that particular claim, Standafer never explained why he had tried to contact Marston to ascertain if the latter had omitted recent past employment from his resume.

Second, there is no evidence as to precisely when Williams Electric—for which Lutz' resume shows that he had performed, inter alia, "Residential & Remodel" electrical work—had gone out of business.[4] Thus, as quoted above, Standafer testified generally that it had been "for some time at the time of [Lutz'] application" and, elsewhere, "for a few years at least at the time of the application[.]" At no point did Standafer testify, nor is there any other evidence, that Williams Electric had been out of business prior to September 30, 1989, when Marston's resume recites that he had ceased working for West Star Electric. Accordingly, had he truly believed that Marston's resume warranted a followup call, Standafer never explained why he had not similarly believed that Lutz' resume likewise warranted such a call. Seemingly, the reasoning which assertedly warranted the call to the one also would have warranted a call to the other applicant.

Beyond the foregoing considerations, as set forth in subsection A above, Respondent eventually did hire Peter J. Abrahamson to fill the vacancy which would be created by the anticipated departure of Higgs. However, examination of Abrahamson's application for employment reveals that, under "Work Experience," he had set forth nothing about having performed residential or remodel electrician's work. His most recent employment had been from September 1990 to April 14, 1994, with City View Electric. There, Abrahamson recited in this application, he had "started as apprentice then obtained License and ran small commercial jobs." The only other electrician's work which he lists is when he had worked as an apprentice electrician for Pete's Repair Inc., from June 1989 to September 1990. Before that he had picked up and delivered trucks, washed and fueled trucks, and run a parts plow during the winters for almost 2 years, while employed by Penske Truck Leasing.

Standafer did testify that, when he had "talked to [Abrahamson] when he stopped in to fill out his application," Abrahamson "told me that he had been working for—I believe it was City View—well he was laid off currently but his last employer had been City View Electric and that he had had some residential and probably more of a commercial with City View[.]" Yet, that asserted explanation is not corroborated by what Abrahamson had written on his application. Furthermore, Abrahamson never appeared as a witness to corroborate that testimony by Standafer, though there was neither testimony nor representation that Abrahamson was unavailable to Respondent as a witness. Moreover, that explanation by Standafer hardly supplies the dates of Abrahamson's employment with City View and, beyond that, it hardly reveals how much supposed residential electrician's work Abrahamson had assertedly performed for City View.

Respondent makes much of the difference between residential and commercial electricians' work. For example, Standafer testified "you can have a real good commercial electrician who cannot perform even though he's very good at commercial, cannot perform residential and vice versa," without passing through "a long learning curve in a lot of cases." To support that conclusionary testimony, Standafer explained that while on commercial jobs electricians have only to run conduit and hang light fixtures, and to deal only with project foremen, but on residential jobs they deal with homeowners and so, "have to be good at a general rapport with [sic] more of a people person," as well as being "able to perform more tasks on a daily routine because the jobs are of a shorter nature[.]" The latter factors are compounded on remodel jobs, testified Standafer, because electricians also have to be able to "work[] around a home owners [sic] possessions . . . without destroying everything" when installing fixtures.

In his description of having interviewed Abrahamson, however, Standafer never explained with particularity what had been said that supposedly allowed him to conclude that Abrahamson would be able to satisfy the above-described residential and remodel requirements. To the contrary, Standafer's description of his interview with Abrahamson displayed a rather casual attitude concerning the latter's qualifications: "we discussed the job that I was—I had intended for him to be hired for and he was comfortable with doing that work," and, elsewhere, "we discussed the residential and the jobs and just the general interview, I got a good feeling, good comfort level with Mr. Abrahamson and therefore offered him an offer of employment." At no point did Standafer describe any inquiry of Abrahamson that would have revealed to Standafer any more recent residential or remodel experience than was disclosed by Lutz's resume. In fact, Standafer's description of the interview, as well as Abrahamson's application for employment, provide no basis whatsoever for concluding that Abrahamson had told Standafer about any residential or remodel experience as a journeyman electrician.

Beyond that, had Standafer but spoken with Lutz, there is no basis for concluding that the latter would not also have been "comfortable with doing [Respondent's projected] work." Nor is there any basis for concluding that, had he contacted and spoken with Lutz during March 1994, Standafer would not have arrived at "a good feeling, good comfort level with Mr. Lutz." In other words, not only does Standafer's description of a relatively brief and summary interview with Abrahamson not reveal any particular effort to ascertain the

[4] In its brief, Respondent appears to attempt to correct that omission by stating as fact that "Williams Electric had gone out of business in the mid-1980's [sic]." I reject that attempt to, in effect, add to the evidence presented during the hearing.

extent of the latter's recent residential and remodel experience, thereby tending to contradict Standafer's assertions of concern about the ability of a commercially-experienced electrician's ability to perform residential and remodel work. It also displays an inconsistent approach to Lutz and Abrahamson as applicants. The only difference between those two applicants, so far as the record shows, is that Lutz' application had been submitted by the Union, while that of Abrahamson had not.

Standafer's supposed concern with recent residential and remodel experience tends further to be contradicted by the actual work assigned to Abrahamson after he had started working for Respondent on May 9, 1994. At that time, Higgs—the employee whom Abrahamson had been hired to eventually replace—still was working for Respondent, his departure for Montana being contingent upon sale of his Minnesota home. There is no evidence that prospects for such a sale had been any better during May 1994 than had been the situation when he earlier had notified Respondent of his plans. In fact, Higgs continued working for Respondent until "I believe June or July," testified Standafer. Thus, it is not surprising that residential and remodel work continued to be assigned to Higgs. Still, that situation left Respondent with a need to locate work for Abrahamson.

During his first month of employment by Respondent—from May 9 through June 8, 1994—Abrahamson performed predominately commercial electrical work, the same type of work which Lutz was qualified to perform. Respondent's records show that Abrahamson worked only 7 days (on May 9 and 31, and on June 1, 2, 3, 6 and 7, 1994) on residential projects, while he worked 15 days (on May 10 through 13, 16 through 20, and 23 through 27, and on June 8, 1994) on commercial projects, virtually a two to one ratio.

To be sure, after June 8 Abrahamson began performing an increased amount of residential work. That may reflect the departure of Higgs. For, Standafer claimed that after Higgs had left, Abrahamson was "changed to strictly residential." But, that claim was not true, as shown by Respondent's own records. From June 9 through August 19, the last day for which records were introduced, Abrahamson performed residential work for 24 full workdays,[5] plus 4 hours on June 16, 6.5 hours on June 24, 1 hour on July 22, 5–1/2 hours on August 4, 7 hours on August 12, and 5 hours on Saturday, August 13, 1994. However, he worked a total of 21 full days doing commercial electrician's work during that same period,[6] plus 4 hours on June 16, 1.5 hours on June 24, 7 hours on July 22, 2–1/2 hours on August 4, and 1 hour on August 12, 1994. Certainly, those comparative figures do not support Standafer's testimony that Abrahamson had performed "strictly residential" electrician's work after Higgs had quit. Indeed, had Higgs actually quit during July 1994, that had been a month during which Abrahamson performed 13 full days of commercial work and merely 4 full days of residential work, while working 7 hours of commercial work on July 22 and only 1 hour of residential work on that day.

When he testified, it did not seem to me that Standafer was being candid. That impression is confirmed by the foregoing review of the record of his testimony and of other evidence. I do not credit Standafer. Of course, as will be seen in section II, infra, standing alone that does not resolve the allegation of unlawful motivation for Respondent's refusal to consider Lutz for employment.

II. DISCUSSION

A. The State Complaint and Discovery Requests Arising During It

The General Counsel encounters a threshold problem with respect to the allegations concerning Respondent's malicious prosecution claims: There has been no final disposition of those claims.

The Supreme Court has held that "the Board may not halt the prosecution of a state-court lawsuit, regardless of the plaintiff's motive, unless the suit lacks a reasonable basis in fact of law." *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 748 (1983). Here, the Minnesota District Court dismissed the malicious prosecution claims. But, in applying the holding of *Bill Johnson's*, the Board has taken, and must take, into account not solely an initial determination, but, as well, whether or not a right of appeal exists and, further, whether or not that appeal right has been exhausted or waived. *Phoenix Newspapers*, 294 NLRB 47, 49 (1989) ("Summary judgment in favor of the union defendants has been entered and the Respondent has waived any right to appeal that judgment."); *Summitville Tiles*, 300 NLRB 64, 65 (1990) ("the state appellate court affirmed the lower court's granting of summary judgment.") Not until there has been a final adjudication can the Board proceed to evaluation of the lawsuit and of the motivation for it.

Respondent has not waived, or otherwise abandoned, its right to appeal Judge Swanson's dismissal of the malicious prosecution claims. To be sure, it has not yet appealed that dismissal. As pointed out in section I.B above, however, no one disputed Respondent's argument that it cannot do so—cannot seek interlocutory or interim relief—until there is a final judgment of the state complaint. Since dismissal of Respondent's other claims was denied, and the state proceeding remains viable, there has been no final judgment. Thus, appeal cannot now be taken of the malicious prosecution claims' dismissal. Nevertheless, Respondent has preserved its record of those claims for appeal, as shown, for example, by the fact that it renewed those malicious prosecution claims in its first amended complaint, filed over 8 months after Judge Swanson's order and memorandum.

Were I to conclude that a violation occurred and to issue the remedial order sought by the General Counsel, and were the Board to uphold those actions, Respondent would be effectively prevented from appealing dismissal of the malicious prosecution claims. For, in the brief, the General Counsel proposes an order requiring, inter alia, "that Respondent cease and desist from: initiating and maintaining civil suits against its employees, the Union or the Union's representatives alleging malicious prosecution on account of their having filed charges with the NLRB or unemployment compensation proceedings[.]" Obviously, eventual appeal from dismissal of the malicious prosecution claims would constitute maintenance of a civil suit and Respondent would be prevented from taking such an appeal by the proposed remedial order.

[5] On June 17, 20 through 23, and 27 through 30, on July 7 and 18 through 20, and on August 3, 5, 8 through 11, and 15 through 19, 1994.

[6] On June 9, 10, 13 through 15, and 10.5 hours on Saturday, June 11, on July 6, 8, 11 through 15, 21, and 25 through 29, and on August 1 and 2, 1994.

Such a remedy could be imposed were there a basis for concluding that Respondent's malicious prosecution claims "lack[] a reasonable basis in fact or law." *Bill Johnson's Restaurants*, supra. Such a conclusion is not possible in the circumstances presented here, however. Those claims were dismissed because there is no precedent in Minnesota for basing malicious prosecution claims upon initiation of administrative proceedings. In other words, Respondent is asserting novel theories to support claims for malicious prosecution.

Historically, novel legal theories have been one vehicle by which the law changes, sometimes expanding and, other times, contracting. No one contends that Minnesota statutes preclude a malicious prosecution cause of action based on administrative proceedings. Nor, as Judge Swanson pointed out, has there been such a holding by Minnesota's highest court.

Conversely, Respondent has pointed to holdings in other jurisdictions which, at least arguably, allow malicious prosecution claims to be based upon administrative proceedings. In consequence, there is no basis for concluding that Respondent's novel theory is unreasonable—that there is no "realistic chance that [Respondent]'s legal theory might be adopted." *Bill Johnson's Restaurants v. NLRB*, supra 461 U.S. at 747.

In light of the foregoing considerations, there is no basis for enjoining Respondent from eventually appealing the state district court's order of January 14, 1994, at the appropriate time. Instead, "the Board must await the results of the state-court adjudication with respect to the merits of the state-court adjudication with respect to the merits of the state suit" for malicious prosecution. Id. At 749. Therefore, I shall dismiss the allegations that Respondent violated Section 8(a)(1) and (4) of the Act by filing malicious prosecution claims based on the charge in Case 18–CA–12542 and on Ouellette's claim for unemployment insurance benefits.

As to the discovery requests, in light of the Supreme Court's holding in *Bill Johnson's Restaurants*, it is not possible to locate an independent basis under the Act for enjoining Respondent from seeking the requested information in the course of the state proceeding. Even though two claims have been dismissed, many others in it remain viable. There is neither allegation nor argument that any one of those claims "lack a reasonable basis in fact or law." Id. at 748. Indeed, were such an allegation or argument to exist, it would not be possible to conclude that there is merit to it, given the reasoning of Judge Swanson's denial of the motion for judgment on the pleadings with respect to those other claims.

The General Counsel argues that the information specified in the unfair labor practice allegations is not "relevant to Ouellette's misrepresentations or the involvement of the Union (or Union Representative Priem) in making those representations." At no point, however, has Respondent asserted, or even indicated, that its requests for documents, interrogatories, and depositions are confined to seeking information only in connection with its claims for malicious prosecution. To the contrary, as set forth in section I.B above, Respondent's counsel has specified a litany of reasons as to how the information sought might support other claims in the state complaint.

Relevance, of course, has developed into an extremely broad concept, as illustrated, for example, by FROE Rule 401: "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." As pointed out in the Advisory Committee's note to that Rule, "The variety of relevancy problems is coextensive with the ingenuity of counsel in using circumstantial evidence as a means of proof," with the result that relevancy "exists only as a relation between an item of evidence and a matter properly provable in the case."

Inasmuch as relevance is determined by the relationship of what is sought to what is to be proved, lack of relevancy claims must be evaluated on the basis of Minnesota law regarding the still viable claims in Respondent's complaint. As to such an evaluation, however, the Board already has held that it will not make efforts to determine the merits of suits arising under state law. "Our expertise lies in resolving labor law questions that arise under the Act, rather than deciding claims that arise under state law." (Fn. omitted.) *Bill Johnson's Restaurant*, 290 NLRB 29, 32 (1988).

Beyond that, it seems unlikely that the Supreme Court's direction to the Board—to allow genuine state law factual and legal issues to be decided by state courts—contemplated allowing the Board to analyze the parties' efforts to present evidence in state proceedings and, then, to make an independent determination as to whether specific items can or cannot be presented, or even discovered, during those state proceedings. Such micro-management of state litigation effectively would undermine the general holding that "the Board should proceed no further with the [Section]8(a)(1)-[Section] 8(a)(4) unfair labor practice proceedings but should stay those proceedings until the state-court suit has been concluded." (Fn. omitted.) *Bill Johnson's Restaurants v. NLRB*, supra at 746. Indeed, long before that case was decided, the United States Court of Appeals for the Eighth Circuit—within the jurisdiction of which this case arises—rejected such an approach. *NLRB v. Katz Drug Co.,* 207 F.2d 168, 171–172 (1953).

The subject matter sought by Respondent's discovery are ones which, for the most part, it could not obtain in the course of a hearing before the Board. Yet, that shows no more than a difference in "relation between an item of evidence and a matter properly provable in [a] case" arising under the Act, as the Advisory Committee pointed out. Rules governing litigation under the Act cannot serve as a device for overriding First Amendment and compelling state interests which the Supreme Court already has held outweigh the inherently coercive and retaliatory effects of state lawsuits. Id. at 740–741. A contrary conclusion would eviscerate the holding of that case, by allowing through indirection a result—control of state litigation—which the Court has barred from being exercised by direction.

It should be pointed out that, in the malicious prosecution portion of his memorandum, Judge Swanson certainly displayed sensitivity concerning the position and rights of employees. That, of course, is precisely what the Supreme Court contemplated. Further, as Respondent points out in its brief, state courts possess ample powers—as, for example, protective orders—to minimize potential risk to employees which, otherwise, might arise as a consequence of discovery.

In sum, there is no basis on which to enjoin Respondent from discovering—through requests for documents, interrogatories and depositions—information which may tend to be of consequence to determination of its surviving state claims. In that respect, Respondent's position is parallel, if not identical, to that of a bargaining agent seeking information to discover

if there is a basis for pursuing a grievance. See, e.g., *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *Shoppers Food Warehouse*, 315 NLRB 258, 259–260 (1994). Therefore, I shall dismiss the allegations that Respondent violated Section 8(a)(1) of the Act because of its discovery requests.

B. Refusal to Consider Lutz for Employment

There is no dispute that Louis John Lutz, during March of 1994, had been a member of the Union and, further, that Respondent had known that Lutz was sympathetic toward the Union. Priem's covering letter disclosed as much to Respondent.

In that letter, Priem pointed out that Lutz "may choose to engage" in protected activity "strictly within the guidelines established by law and the National Labor Relations Board[.]" Respondent denies that the prospect of such activity, and Lutz' generally disclosed relationship with the Union, had motivated the decision not to consider Lutz for employment and to hire him. Yet, as concluded in section I.C above, the official who had made that decision—Human Resources Manager Standafer—was not a credible witness. Thus, I do not credit his assertion that he had disregarded Lutz' application because the latter's resume showed no recent residential and remodel experience.

Nor do I credit Standafer's added assertion that he had feared that Lutz would work for Respondent only until he could locate a higher-paying commercial electrician's job. After all, such a fear could have been no less applicable to Abrahamson. His application for employment revealed only commercial work as a journeyman. Standafer advanced no testimony which would show that, during the employment interview, Abrahamson had said anything which Standafer could have construed as a promise to remain with Respondent, rather than seek commercial electrician's employment elsewhere. Indeed, so far as Standafer's testimony shows, this supposedly important consideration had not even been mentioned during the employment interview with Abrahamson.

Ordinarily animus, or unlawful intent, is shown by an employer's unlawful statements and, sometimes, by other unlawful actions. See, e.g., *NLRB v. Clinton Packing Co*., 468 F.2d 953, 954 (8th Cir. 1972); *NLRB v. Superior Sales,* 366 F.2d 229, 233 (8th Cir. 1966). Still, the absence of such direct evidence of animus or unlawful intent is not fatal to an allegation of discriminatory motivation. "Even without direct evidence, the Board may infer animus from all the circumstances." (Citations omitted.) *Electronic Data Systems*, 305 NLRB 219, 219 (1991). Just as the existence of unlawful statements and other unlawful conduct, of itself, does not mandate a conclusion of discriminatory motivation with regard to a specific allegedly unlawful action, see, e.g., *Florida Steel Corp. v. NLRB*, 587 F.2d 735, 744 (5th Cir. 1979); *NLRB v. Speed Queen*, 469 F.2d 189, 194 (8th Cir. 1972); *Graham Architectural Products Corp.*, 259 NLRB 1174 fn. 2 (1982), so, also, absence of other unlawful conduct, of itself, does not preclude a conclusion that a particular action has been motivated by animus or hostility toward union sympathy or support. *Auto-Truck Federal Credit Union*, 232 NLRB 1024, 1027 (1977), and cases cited in footnote 4.

Several factors present here provide objective indicia of discriminatory motivation. First, had Lutz been hired, he would have been the lone activist on behalf of the Union, so far as the record discloses, then employed by Respondent. In the context of an allegedly unlawful discharge, the fact that the alleged discriminatee is a union activist "can give rise to an inference of violative discrimination." *NLRB v. First National Bank of Pueblo*, 623 F.2d 686, 692 (10th Cir. 1980). See also, *Handicabs, Inc.*, 318 NLRB 890, 897 (1995), enfd. by Opinion No. 95–3352 of the United States Court of Appeals for the Eighth Circuit on September 11, 1996, see slip op. at 8. So, also, is animus evidenced by discharge of a leading union adherent. See *NLRB v. Ri-Del Tool Mfg. Co*., 486 F.2d 1406 (7th Cir. 1973). Parallel reasoning dictates a conclusion that animus likewise is evidenced by refusal to consider for hire a known union adherent where, as here, there is no evidence that a respondent then employed any other union activists or, for that matter, sympathizers.

Second, Standafer's explanation for failing to consider Lutz for employment not only was not advanced credibly. His asserted reasons were contradicted by his own admitted actions in connection with his procedure for hiring an electrician to eventually replace Higgs. Thus, though he made no effort whatsoever to contact Lutz, he did try to contact another applicant, Marston, whose resume showed no residential or remodel experience, so far as the evidence reveals, more recent than that shown on Lutz' resume. Moreover, inasmuch as Marston's resume stated that he had not received a Class A Journeyman's License until March 2, 1994—a few days before having submitted that resume to Respondent—Marston's 1989 residential and remodel wiring experience obviously had not been as a journeyman—at least, not from the face of the resume. In contrast, of course, Lutz possessed not merely a journeyman's license, but also a Class A Master license.

Another inconsistency arose in connection with Abrahamson's application for employment. As pointed out in section I.C above, it showed that his only experience as a journeyman electrician had been when he "ran small commercial jobs" for City View Electric from September 1990 to April 19, 1994. No residential or remodel experience whatsoever—either as apprentice or journeyman—is revealed by that application. Nor did Standafer testify with particularity about any such experience being disclosed during his preemployment interview with Abrahamson. Nevertheless, Respondent hired him. Furthermore, if concern existed with past commercial employment leading a successful applicant to work for Respondent only until a commercial job could be located, as Standafer claimed, then surely such a concern was no less applicable to Abrahamson than to Lutz.

In sum, the evidence shows that Respondent had followed inconsistent paths in considering the resume of Lutz, on the one hand, and those of Marston and Abrahamson, on the other. So far as the record discloses, the only significant difference had been that the application for Lutz had been made by the Union, thereby revealing to Respondent not only that Lutz was one of the Union's supporters, but that he likely would engage in organizing activity once employed by Respondent. In contrast, Respondent had no basis for believing that the Union had sponsored the applications of Marston and Abrahamson. To the contrary, so far as the evidence shows, Respondent had no reason to believe that either man was even sympathetic toward the Union.

Third, at the time of Lutz' application, Respondent was maintaining a lawsuit against, among others, the Union. Such conduct would hardly dispose an employer to view with favor an applicant whose resume had been submitted by the very labor organization which was being sued by that employer.

As discussed below, Respondent takes the position that, as a matter of law, it should not be obliged to accept referrals from the Union because of prior falsified applications submitted by it and its supporters. However, there is no evidence that Standafer had been aware of that position when evaluating Lutz' resume. Standafer never claimed that he had relied upon such a policy when discarding Lutz' resume. Nor did he claim that he had doubted the veracity of any information appearing on that resume. Further, Respondent's counsel conceded that Respondent was not claiming that its legal position on not being obliged to accept union-affiliated applications had been "the basis for what happened with respect to Mr. Lutz," inasmuch as "Mr. Standafer has testified to" his reasons for rejecting Lutz' application.

Finally, that Standafer failed to advance a credible reason for not considering Lutz for employment is, itself, a factor tending to show that Respondent's true reason had been an unlawful one. *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). "If one can show that every other alternative except the fact sought to be proved is not true, you indirectly prove the fact is true." *NLRB v. Melrose Processing Co*., 351 F.2d 693, 698 (8th Cir. 1965). Here, to explain why Lutz had not been contacted for employment with Respondent, Standafer advanced reasons which were not credible. Consequently, those alternative reasons were not the true ones which motivated Standafer. That conclusion, in the context of the foregoing considerations, considered collectively, establish that Respondent harbored animus or unlawful intent toward the Union and its supporters.

Beyond that, the absence of credible legitimate reasons for refusing to consider Lutz for employment and the totality of those foregoing considerations, as well as of other ones discussed in section I.C, supra, establish that Respondent's true motive for failing to hire Lutz had been his disclosed relationship with the Union. He had been more qualified for the opening than Marston and Abrahamson. Respondent rejected the application filed on his behalf. The only difference between his situation and that of Marston and Abrahamson had been that the latter two applicants were not revealed adherrents of the Union, as had been Lutz. Therefore, a preponderance of the credible evidence establishes that Respondent violated Section 8(a)(3) and (1) of the Act by not hiring Lutz. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Such a violation usually warrants issuance of, inter alia, a reinstatement order. As pointed out above, however, Respondent contends that, as a matter of law, it is entitled to reject any applicant referred by the Union, because the Union has demonstrated that it is "a referral source that had proven itself to be inherently untrustworthy." Yet, as also pointed out above, there is no evidence of falsified information in Lutz' resume. And, in any event, Respondent admits that purported inherent untrustworthiness of the Union's referrals had not been even one reason for rejecting Lutz for employment.

Still, those facts would not necessarily preclude Respondent from arguing that it should not have to reinstate Lutz because his had been one of a number applications submitted over the years by a source of proven untrustworthiness. I barred such evidence because the issue posed by the complaint in Case 18–CA–13193 is whether liability exists—whether unlawful motivation had been present. Had it not, obviously receipt of evidence pertaining to the reinstatement remedy would have been a waste of time and effort.

Having concluded that unlawful motivation has been established, the issue of reinstatement can be addressed during the compliance phase of this proceeding. "This Court and other lower courts have long recognized the Board's normal policy of modifying its general reinstatement . . . remedy in subsequent compliance proceedings as a means of tailoring the individual circumstances of each" discriminatory act. (Citations omitted.) *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 902 (1984). Here, Respondent already has presented some evidence showing that it has ceased utilizing one other referral source because of the latter's unreliability. On the other hand, it may be that the Board and courts will regard it to be inherently destructive of Section 7 rights to allow employers to reject absolutely union-sponsored employment applicants, no matter the extent of adverse experiences with such applicants.

Even if there is unwillingness to allow so general a course, the Board and courts still may be willing to allow employers to reject union-sponsored applicants only in more carefully defined, particular situations, in accordance with specifically-formulated guidelines. In that regard, Respondent's state litigation may disclose information which permits it, as well as the Union and the General Counsel, to make a more complete record regarding the propriety of reinstatement in the circumstances of Respondent's situation. In any event, I rejected Respondent's evidence concerning reinstatement, because that issue was not ripe for resolution, and consideration of its defense to reinstatement will be deferred to the compliance stage of this proceeding.

CONCLUSIONS OF LAW

Wright Electric, Inc. has committed unfair labor practices affecting commerce by refusing to consider for employment and to hire Louis John Lutz, in violation of Section 8(a)(3) and (1) of the Act. It has not committed any other unfair labor practices alleged in the amended complaint in Case 18–CA–12820, as amended, and in the complaint in Case 18–CA–13369.

REMEDY

Having concluded that Wright Electric, Inc. has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it shall be ordered, within 14 days from the date of this Order, to offer Louis John Lutz full reinstatement to the electrician's job for which he was denied employment or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges which he would have enjoyed had he not been unlawfully denied employment. In addition, within 14 days of the date of this Order, it shall remove from its files any reference to the unlawful refusal to hire him and, within 3 days thereafter, notify Lutz in writing that this has been done and the refusal to hire him will not be used against him in any way. Further, it shall be ordered to make Louis John Lutz whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, with backpay to be computed on a quarterly basis, making deductions for interim earnings, *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be paid on amounts owing, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]